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Docket No. 80-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACKSONVILLE BULK TERMINALS, INC., HOOKER CHEMICAL CORPORATION and OCCIDENTAL PETROLEUM CORPORATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

THOMAS W. GLEASON
One State Street Plaza
New York, NY 10004
(212) 425-3240

Attorney for Respondent International Longshoremen's Association, AFL-CIO

MAHON, MAHON & FARLEY
350 East Adams Street
Jacksonville, FL 33202
(904) 354-4300

Attorneys for Respondent Local 1408 and its members and for the individual Respondents

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG

TABLE OF CONTENTS

PAGE

Statement of the Case 2

ARGUMENT 5

1. There Is No Conflict Among the Circuits Requiring Review By This Court 5
2. The Fifth Circuit Correctly Applied the Holding of *Buffalo Forge* 9
3. Reconsideration of *Buffalo Forge* Is Unwarranted 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Baldovin v. *International Longshoremen's Association, AFL-CIO*, 626 F.2d 455 (5th Cir. 1980) 10

Buffalo Forge Co. v. *United Steelworkers of America*, 517 F.2d 1207 (2d Cir. 1975) 7

Buffalo Forge Co. v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976) 4, 5, 6, 10, 11, 12

Cedar Coal Co. v. *United Mineworkers of America*, 560 F.2d 1153 (4th Cir. 1977) 5

Corporate Printing, Inc. v. *New York Typographical Union No. 6*, 555 F.2d 18 (2nd Cir. 1977) 5

Hampton Roads Shipping Association v. *International Longshoremen's Association, AFL-CIO*, 631 F.2d 282 (4th Cir. 1980) 5, 6, 9

PAGE

J.A. Jones Construction Co. v. *Plumbers and Pipefitters Local 598*, 568 F.2d 1292 (9th Cir. 1978) 5

Jacksonville Maritime Association, Inc. v. *International Longshoremen's Association, AFL-CIO*, 571 F.2d 319 (5th Cir. 1978) 5

John W. McGrath Corporation v. *Atlantic Coast District, ILA*, 80-CV-150 (N.D.N.Y.) 5-6

Khedivial Line v. *Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960) 6, 7

LaTrobe Steel Co. v. *United Steelworkers of America, AFL-CIO*, 545 F.2d 1336 (3d Cir. 1976) 5

NLRB v. *C.K. Smith & Co.*, 569 F.2d 162 (1st Cir. 1977) 5

NLRB v. *International Longshoremen's Association, AFL-CIO*, 332 F.2d 992 (4th Cir. 1964) 6

NLRB v. *Keller-Crescent Co.*, 538 F.2d 1291 (7th Cir. 1976) 5

National Rejectors Industries v. *United Steelworkers of America*, 562 F.2d 1069 (8th Cir. 1977) 5

New Orleans Steamship Association v. *General Longshore Workers, ILA*, 626 F.2d 455 (5th Cir. 1980) 1

Walker Bros. Stone Co. v. *United Steelworkers of America, AFL-CIO*, 620 F.2d 132 (6th Cir. 1980) 5

Statutes:

29 U.S.C. § 104 6

29 U.S.C. § 152(9) 6

29 U.S.C. § 185 ..... 7, 8

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents International Longshoremen's Association, AFL-CIO, and its affiliated locals and officers respectfully request that the Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case. The opinion below is reported *sub nom New Orleans Steamship Association* v. *General Longshore Workers, ILA,* at 626 F.2d 455 (5th Cir. 1980) and is reproduced at Petition 1a *et seq.**

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* The appeal to the Fifth Circuit was consolidated with a case arising out of the ILA work stoppage in New Orleans, Louisiana. However, that case involved the scope of injunctions granted after an arbitrator's decision and is not germane here.

Statement of the Case

The petition arises from the Fifth Circuit's reversal and *vacatur* of a preliminary injunction granted by the District Court for the Middle District of Florida, Jacksonville Division, which enjoined respondents from refusing to load three ships named in the order because of a grievance concerning the shipment of cargo to the Soviet Union and which directed respondents to process any such grievance in accordance with the contractual grievance machinery of their collective bargaining agreement.

In response to the invasion of Afghanistan by the Soviet Union, Respondent International Longshoremen's Association, AFL-CIO ("ILA") adopted a resolution that its members would not handle any cargo bound to or coming from the Soviet Union. The resolution was generated by the overwhelming sentiment of the rank and file longshore union members, who wish to protest the act of naked agression and who in conscience would have no part in contributing, directly or indirectly, to the economic or military well-being of a nation now recognized as a serious threat to this country. The refusal to handle Soviet goods covers all ports on the East and Gulf Coasts. It was not motivated by any hope for economic gain or by any dispute with the various ILA employers.

Members of Respondent Local 1408, ILA, AFL-CIO ("Local 1408") are employed by Petitioner Jacksonville Bulk Terminals, Inc. ("J.B.T."), which maintains a bulk marine shipping terminal in the Port of Jacksonville, Florida. J.B.T. is a wholly owned subsidiary of Oxy Chemical Corporation ("Oxy"), which in turn is a subsidiary of Petitioner Hooker Chemical Corporation ("Hooker"). All three companies are owned by Petitioner Occidental Petro-

leum Corporation ("Occidental"). J.B.T. is a party to the collective bargaining agreement between the Jacksonville Maritime Association, Inc. and Locals 1408, 1408-A and 1593 of the ILA. The other corporations are not parties to the contract. J.B.T. is engaged in the loading of superphosphoric acid ("SPA") produced by Hooker onto ships destined for the Soviet Union from the Port of Jacksonville.

In addition to the clauses quoted at Petition pp. 3 and 4, the collective bargaining agreement between J.B.T. and Local 1408 provides in ¶15F:

> The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. *Anything not contained in this Agreement shall not be construed as being part of this Agreement.* (emphasis supplied).

On January 15, 1980 a Norwegian vessel entered the port to take on SPA for transport to the Soviet Union. The members of Local 1408 refused to handle the cargo. At no time did Local 1408 refuse to handle any other cargo which was not proceeding to the Soviet Union.

J.B.T. filed a complaint in the district court seeking a temporary restraining order, preliminary injunction, permanent injunction, specific performance, and damages. A hearing was held on January 31, 1980 before Honorable Susan H. Black, United States District Judge, which resulted in the order appealed from.

Contrary to petitioners' present contention, the district court in its opinion, found (and the circuit court agreed) that there was no underlying dispute between petitioners and respondents (Petition, 32a). However, it held since the underlying dispute was not a "labor dispute," the prohibition of §4 of the Norris-LaGuardia Act was not applicable and granted the injunction.

In reliance upon this Court's holding in *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976) (hereinafter *"Buffalo Forge"*), the Fifth Circuit held that respondents' underlying dispute with the Soviet Union could not be processed under the arbitration clause of the collective bargaining agreement, although the resulting dispute whether the unions' action in response to the non-arbitrable dispute violated the no-strike clause might be arbitrable. 626 F.2d at 467. The Fifth Circuit rejected the notion that the resulting, arbitrable dispute was not a labor dispute within the meaning of the Norris-LaGuardia Act, 626 F.2d at 465, and held that, under *Buffalo Forge*, no injunction could issue prior to a determination of the arbitrator. 626 F.2d at 467.

The Fifth Circuit vacated the preliminary injunction, reversed the order to arbitrate the underlying dispute and affirmed the district court's judgment insofar as it ordered the parties to submit to arbitration the question whether the work stoppage violated the no-strike clause. 626 F.2d at 469.

Petitioners now seek a Writ of Certiorari from this Court to review the Fifth Circuit's decision.

ARGUMENT

1. There Is No Conflict Among the Circuits Requiring Review By This Court.

The Fifth Circuit's understanding and application of *Buffalo Forge, supra,* is consistent with its own prior interpretation of that case, *Jacksonville Maritime Association, Inc.* v. *International Longshoremen's Association, AFL-CIO,* 571 F.2d 319, 325 (5th Cir. 1978) and with that of every other circuit which has addressed the subject. *NLRB* v. *C.K. Smith & Co.,* 569 F.2d 162 (1st Cir. 1977); *Latrobe Steel Co.* v. *United Steelworkers of America, AFL-CIO,* 545 F.2d 1336, 1341 (3d Cir. 1976); *Cedar Coal Co.* v. *United Mineworkers of America,* 560 F.2d 1153, 1169 (4th Cir. 1977); *Walker Bros. Stone Co.* v. *United Steelworkers of America, AFL-CIO,* 620 F.2d 132 (6th Cir. 1980); *NLRB* v. *Keller-Crescent Co.,* 538 F.2d 1291, 1295 (7th Cir. 1976). *J.A. Jones Construction Co.* v. *Plumbers and Pipefitters Local 598,* 568 F.2d 1292 (9th Cir. 1978). The Second and Eighth Circuits, too, would seem to have expressed a similar view. *Corporate Printing Co.* v. *New York Typographical Union Number 6,* 555 F.2d 18, 20 (2d Cir. 1977); *National Rejectors Industries* v. *United Steelworkers of America,* 562 F.2d 1069, 1075 (8th Cir. 1977).

Moreover, with respect to the precise situation of this case, the Fifth Circuit's decision is in perfect accord with that of the Fourth Circuit independently arrived at in another case arsing out of the same ILA work stoppage. *Hampton Roads Shipping Association* v. *International Longshoremen's Association, AFL-CIO,* 631 F.2d 282 (4th Cir. 1980).* The District Court for the Northern District of New York also came to the same conclusion. *John W.*

* A Petition for a Writ of Certiorari to the Fourth Circuit is presently pending. No. 80-1058.

McGrath Corporation v. *Atlantic Coast District ILA*, 80-CV-150 (N.D.N.Y.). (The court's unreported opinion is reproduced as an Appendix to the brief for respondents in opposition to Petition for a Writ of Certiorari to the Fourth Circuit in the *Hampton Roads Shipping Association* case, Docket No. 80-1058).

Thus, there is no conflict or confusion among the lower courts as to the meaning of *Buffalo Forge* or as to its applicability to the situation under review here.

In their effort to concoct a conflict among the circuits as to the applicability of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, petitioners are forced to go far afield. The cases they rely on are readily distinguishable.

NLRB v. *International Longshoremen's Association, AFL-CIO*, 332 F.2d 992 (4th Cir. 1964) (*"Ocean Shipping"*) involved a secondary boycott proceeding. True, the Fourth Circuit held that the political dispute there was not a labor dispute within the meaning of § 2(9) of the National Labor Relations Act, 29 U.S.C. § 152(9) and denied enforcement of the NLRB's order. However, *Ocean Shipping* lacked the very element which is a labor dispute in the present case—a disagreement between the employer and the union as to whether the latter is contractually required to work in the circumstances of this case. The Fourth Circuit in *Hampton Roads Shipping Association* v. *ILA, supra*, found its earlier decision in *Ocean Shipping* no impediment to reaching the same result as the Fifth Circuit did in the case at bar.

Like *Ocean Shipping*, the Second Circuit's decision in *Khedivial Line* v. *Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960) long preceded *Buffalo Forge*. As with the Fourth Circuit, the Second Circuit found its earlier decision no obstruction to application of the bar of Norris-

LaGuardia to circumstances like those of the present case. *Buffalo Forge Co.* v. *United Steelworkers of America*, 517 F.2d 1207 (2d Cir. 1975). *Khedivial* involved picketing of ships of the United Arab Republic in support of a union's political dispute with Arab nations. The Arabian shipowners sought to enjoin the picketing as a common law tortious interference with business. In dictum, the Second Circuit remarked that Norris-LaGuardia would not apply, but denied the injunction on other grounds. As in *Ocean Shipping*, but unlike the case at bar, the unions' employers were not involved in the *Khedivial* case. The dispute was solely between the union and third parties and in each case the relief sought was solely to prohibit picketing, not to require the unions to perform work under their collective bargaining agreements.

The instant case is a suit under Labor-Management Relations Act § 301, 29 U.S.C. § 185 (LMRA), to enforce a labor agreement. Whether or not respondents' underlying dispute with the Soviet Union is a labor dispute is irrelevant. The second dispute over a possible violation of a no-strike clause *is* a labor dispute. Indeed it is hard to imagine anything more quintessentially a labor dispute than a disagreement between an employer and his employees over whether, under certain circumstances, they are required by their labor contract to work. Such a dispute manifestly goes to a term and condition of employment. Thus, however one may characterize the unions' grievance against the Soviet Union, a labor dispute is generated when an employer claims that the unions' actions in response to that grievance violate the employer's labor contract.

This characterization of the two disputes is borne out by the applicable statutes themselves. Federal jurisdiction over this case is invoked under LMRA §301—a suit for breach of a collective bargaining agreement. To the extent

that petitioners invoke federal jurisdiction because a labor contract is involved they themselves incur the prohibition of Norris-LaGuardia §4. No epistemological evaluation of the dispute is necessary. If a labor dispute is not involved, the Court has no jurisdiction and cannot grant an injunction. If a labor dispute is involved, Norris-LaGuardia applies and no injunction can issue.

This Court in *Buffalo Forge* addressed the very premise on which petitioners' rely, saying

> . . . Congress rejected the proposal that the Norris-LaGuardia Act's prohibition against labor dispute injunctions be lifted to the extent necessary to make injunctive remedies available in federal courts for the purpose of enforcing collective bargaining agreements. 428 U.S. at 409.

Petitioners' assertion, then, that the Fifth Circuit "recognized" that it was in conflict with other courts is simply not true.* The other cases dealt with disputes like the *underlying* dispute here, which may or may not involve a labor dispute. But the Fifth Circuit was dealing with the *resulting* dispute over the employer's claim of a violation of the no-strike clause, for which it invoked federal jurisdiction under LMRA §301.

There exists no conflict or confusion among the lower courts as to the applicability of the Norris-LaGuardia ban or the holding of *Buffalo Forge* to the kind of case presented here.

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* Petitioners' attempt to manufacture an internal inconsistency within the Fifth Circuit is equally specious. All the cases cited in fn. 6 at Petition p. 8 were decided before *Buffalo Forge*. The Fifth Circuit opted to follow its own "earlier and more fully expressed opinion." 626 F.2d at 465.

2. The Fifth Circuit Correctly Applied the Holding of *Buffalo Forge*.

The Fifth Circuit's decision in this case, paralleled by the Fourth Circuit's in *Hampton Roads Shipping Association* v. *International Longshoremen's Association, AFL-CIO, supra,* was an uncomplicated and direct application of the holding in *Buffalo Forge*. The underlying dispute between the ILA and the USSR is not a dispute with an ILA employer. "The Union has gone on strike not by reason of any dispute it or any of its members have with the employer, . . ." 428 U.S. at 404, 405. "[T]he strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." 428 U.S. at 407. "[N]either its causes nor the issues underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents." 428 U.S. 407, 408. "[T]he strike had neither the purpose nor effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain." 428 U.S. 408.

In these circumstances, the underlying dispute is clearly not arbitrable. The resultant dispute whether the union's action violates the express no-strike clause may be arbitrable, and the Fifth Circuit correctly ordered arbitration of that question. But, following the express holding of *Buffalo Forge,* 428 U.S. at 412, the circuit court held that no injunction could be granted prior to the arbitrator's ruling.

Petitioners' attempt to evade the dictates of *Buffalo Forge* by arbitrarily characterizing the union's work stoppage as an invasion of management rights is unavailing. The record shows that respondents have made no attempt to dictate to the employers. The ILA's concern in this

matter is solely its own participation in the Soviet enterprise. Whatever others may do, longshoremen do not wish themselves to service the aggressors. They have made no attempt to enlist the support of other unions, businesses, or the public, or their employers. The ILA does not punish anyone whose conscience is less sensitive. It does not refuse to handle the non-Soviet cargo even of companies like Occidental, who are notorious for trading with the Russions. It does not withhold services to its employers who continue to carry Russian goods, as long as longshoremen do not have to handle them. It does not even take reprisals against those employers who circumvent the ILA action by diverting vessels to foreign ports or to ports where the refusal to handle has been enjoined. *See, Baldovin* v. *International Longshoremen's Association, AFL-CIO,* 626 F.2d 445, 452 (5th Cir. 1980). Thus, to characterize this as a dispute between the union and the employers over management's rights would be a transparent fiction.

Management rights are being violated, if at all, only by the work stoppage and it is only the work stoppage petitioners sought to enjoin. Thus, it is really a violation of the no-strike clause which is complained of, even if the misleading label of "management rights" is invoked. The question would remain whether striking over a non-arbitrable dispute violates management rights. This is a matter of interpretation and construction of the contract, which the parties have agreed is for the arbitrator. This Court has expressly rejected the argument that a pre-arbitration injunction may be granted because one of the parties claims that some arbitrable provision of the contract is at issue. (*Buffalo Forge, supra,* 428 U.S. at 408, n. 10, 409)

It is readily apparent that what petitioners urge and what the Fifth Circuit refused to permit was a ruling that a preliminary injunction might be granted prior to arbitration, upon the Court's unilateral determination that the no-strike clause has been violated. This was what had been urged by the dissent in *Buffalo Forge* and what was rejected by the majority, 428 U.S. at 412, which recognized that it would deprive the Union of the benefits of the very arbitration clause that the employer was seeking to invoke.

3. Reconsideration of *Buffalo Forge* Is Unwarranted.

The decision in *Buffalo Forge* is sound and clearly understood by the lower courts. Petitioners' dissatisfaction stems not from any flaw in this Court's reasoning, but from their own desire to circumvent their agreement to submit disputes to arbitration rather than to the courts. Even while recognizing that the arbitration clause is the *quid pro quo* for an agreement not to strike, petitioners would deny the unions the right to have an arbitrator decide whether their action violates the no-strike clause while at the same time depriving them of the right to strike. Petitioners' position is really antithetical to the policy favoring arbitration. It would arrogate to the courts the threshold decision which the parties committed to the arbitrator. And such a policy, if accepted, would have the practical effect of inhibiting unions from including in their collective bargaining agreements the kind of broad arbitration and no-strike clauses the law favors.

Most damaging to petitioners' argument that the Fifth Circuit's decision deprives them of their bargain and eviscerates the presumption of arbitrability is the history of the case which was consolidated in the Fifth Circuit with the case herein. There, the New Orleans employers, con-

sistent with their contract and with *Buffalo Forge*, went immediately to arbitration. At the same time that petitioners were litigating over a preliminary injunction, the district and circuit courts enforced the arbitrators' rulings in favor of the New Orleans employers.

In short, it is not *Buffalo Forge* or the Fifth Circuit that deprives petitioners of any arbitration they were entitled to, but petitioners own precipitous application for a pre-arbitration injunction. Had they immediately sought arbitration, this matter would have been laid to rest long ago. Petitioners' discomfort in a situation of their own creation is no ground for this Court to review a thoroughly reasoned and well-understood decision not five years old.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

THOMAS W. GLEASON
One State Street Plaza
New York, NY 10004
(212) 425-3240

Attorney for Respondent International Longshoremen's Association, AFL-CIO

MAHON, MAHON & FARLEY
350 East Adams Street
Jacksonville, FL 33202
(904) 354-4300

Attorneys for Respondent Local 1408 and its members and for the individual Respondents

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG